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No. 04-637

In The Supreme Court Of The United States

MARGARET BRADSHAW, Warden,

Petitioner,

v.

JOHN DAVID STUMPF,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Warden's opening brief showed that the Sixth Circuit relied on a flawed understanding of the law, both in holding that Stumpf's plea was not knowing and voluntary, and in finding a due process violation. The record here shows that Stumpf and his partner Wesley robbed and brutally shot Mr. and Mrs. Stout, grievously wounding him and killing her. Stumpf's conviction for aggravated murder, based on his guilty plea, did not violate the Constitution.

First, Stumpf's guilty plea was valid because the record shows that he understood the deal he was making, and his brief establishes no basis for relieving him of the consequences of that plea. In fact, Stumpf acknowledges that the plea colloquy creates an "initial presumption" that his plea was knowing and voluntary, imposing a "significant burden" for him to overcome. Stumpf Br. at 22, 24. Stumpf asserts that the State attempts to make this presumption irrebuttable, *id.* at 22, but that is simply not true. Stumpf's claim fails not because the presumption is irrebuttable, but rather because he points to no evidence rebutting it.

Stumpf asserts that his claim at the plea hearing that he was not the shooter shows that his plea must have been uninformed. But that is not so. In deciding to plead, Stumpf knew that the prosecutor could show that Stumpf had specific intent, either as the actual shooter or as a willing participant. The evidence included (1) that Stumpf had participated in the robbery, (2) that Stumpf had held the Stouts at gunpoint, (3) that Stumpf shot Mr. Stout in the head twice, (4) that Mrs. Stout was shot almost immediately after Mr. Stout with the same weapon (i.e., with Stumpf's gun), and (5) that Stumpf had the gun after Mrs. Stout was shot. Thus, it made perfect sense for Stumpf to plead guilty (thereby reducing his chances for a capital sentence), notwithstanding his claim that it was Wesley, not Stumpf, who pulled the trigger. And contrary to Stumpf's argument, accepting the plea deal does not show an "abiding, obvious and uncorrected

misunderstanding" of the elements of aggravated murder. *Id.* at 21. Indeed, striking the plea on this record, as the court below did, renders the presumption of regularity virtually meaningless, a result that portends disaster for the finality of the thousands of state court convictions based on such pleas.

Stumpf's due process claim fares no better. He contends that the State had a duty to "correct" his conviction and sentence after the State presented "newly-discovered evidence" at Stumpf's co-defendant's later trial. *Id.* at 1, 3, 15. But that contention finds no support in the Court's due process jurisprudence. First, the State's presentation of evidence at Stumpf's co-defendant's later trial was not "inconsistent" with Stumpf's own admission of guilt in his plea. Second, the State has provided Stumpf sufficient process on this issue. He has litigated it in three separate state forums—each of which was aware of all of the "new evidence." He simply lost on his claim. Nor is this a case, like those Stumpf relies upon, see *id.* at 31, where the prosecutor knowingly used false evidence to obtain a conviction. No one disputes that at every stage of Stumpf's proceedings the prosecutor has fully disclosed to both Stumpf and the courts all relevant evidence.

At the end of the day, Stumpf's "due process claim" is really some sort of "actual innocence claim." That is, he claims he is entitled to withdraw his plea because, in his view, new evidence from Wesley's trial shows he is not guilty of aggravated murder. But even aside from the legal problems with that claim, it is simply not true as a matter of fact. The evidence provides ample support for Stumpf's plea. Stumpf bases his innocence on his assertion that he was not even in the house when Mrs. Stout was shot. See Stumpf Br. at 1, 43. But all three available witnesses deny this: Wesley says Stumpf was the shooter, Mr. Stout says he heard two male voices immediately before he heard the four gunshots that killed his wife, and Wesley's cellmate, Eastman, while naming Wesley as the shooter, places Stumpf there when the

shooting occurred. Thus, Stumpf has not shown a due process violation.

Finally, Stumpf's assertion that the Warden "does not address the Sixth Circuit's grant of *habeas* relief on the due process claim as to Stumpf's death sentence," Stumpf Br. at at 15, 44, is simply wrong. His argument rests on the flawed premise that the Sixth Circuit separately vacated the conviction and the sentence, but the court below did not. Rather, the Sixth Circuit vacated the conviction, and, *as a result of that*, the sentence also fell. That is, the Sixth Circuit did not send Stumpf back for new sentencing (the result if it would have vacated his sentence), but rather for a new trial. Thus, if the Court reinstates his conviction, as it should, the lower court's opinion provides no independent basis for declining to reinstate his sentence as well.

ARGUMENT

A. Stumpf's guilty plea was voluntary and intelligent under *Henderson v. Morgan*, 426 U.S. 637 (1976).

Stumpf appears to agree with the Warden that, under *Henderson v. Morgan*, 426 U.S. at 647, a strong presumption of regularity arises from the record of a plea hearing where a defendant is represented by counsel. See Stumpf Br. at 24. The parties disagree primarily on the type and quality of evidence necessary to overcome that presumption. Stumpf asserts that the record creates "pervasive and deep" doubt about his plea. *Id.* That argument, however, relies largely on mischaracterizations of both the record evidence and Ohio law. Once those are addressed, the record actually reinforces the presumption of regularity, dooming his claim here.

1. *Henderson* creates a strong, but rebuttable, presumption of regularity.

Stumpf acknowledges that under *Henderson* the plea colloquy here creates an "initial presumption," see Stumpf

Br. at 22, that Stumpf's plea was knowing and voluntary. And he admits that the presumption imposes a "significant burden" for him to overcome. *Id.* at 24. In fact, he essentially concedes that the plea must stand if there is any "principled means" of supporting it in the plea record. *Id.* at 24.

At the same time, however, Stumpf mischaracterizes the Warden's *Henderson* argument. He incorrectly contends that the Warden reads *Henderson*, 426 U.S. at 647, as "com[ing] close to an irrebuttable presumption" of voluntariness from the defendant's and his counsels' on-the-record representations that counsel properly advised the defendant. Stumpf Br. at 22. In fact, far from relying on an "irrebuttable presumption," the Warden merely argues that the presumption of voluntariness that arose from Stumpf's and his counsels' statements is not rebutted by the supposed "confusion" that the Sixth Circuit "discovered" on the plea hearing record. Indeed, if the record here fails to support a plea, then *Henderson*'s presumption is a presumption in name only—a result the Court should not countenance.

The Warden agrees that a guilty plea hearing record in some cases may, as Stumpf suggests, show "pervasive and deep" doubt about whether the defendant's plea was knowing and voluntary. See Stumpf Br. at 24. For example, in *Nash v. Israel*, 707 F.2d 298, 302–03 (7th Cir. 1983), the defendant told the judge on the record that he did not understand the charge to which he was pleading guilty, even though his attorney had explained it to him. The court of appeals correctly held that the judge's failure to explain the charge to the defendant after the latter had stated, point blank, that he did not understand it, rendered the plea unknowing. But the record here falls far short of meeting that standard.

2. The record here does not show that Stumpf was confused about the elements of his crime.

Stumpf's argument that the plea hearing itself shows that his plea was unknowing and involuntary dances around

both the facts and Ohio's criminal law. For example, Stumpf asserts that "[t]he only proof of intent offered at Stumpf's plea hearing . . . was the conclusion that Stumpf had been the principal offender." Stumpf Br. at 13. But as the Warden's opening brief more fully describes, that is not the case. The factual basis hearing included evidence that Stumpf robbed the Stouts, that he held the Stouts at gunpoint, that he shot Mr. Stout twice in the head, that the same gun was used to shoot both Mr. and Mrs. Stout, and that, immediately before Mrs. Stout's shooting occurred, Mr. Stout heard two male voices talking. See Ohio Br. at 11–12.

What Stumpf's argument also fails to address is that, under Ohio law, circumstantial evidence—such as the defendant's active participation in a robbery using a weapon under circumstances showing a reckless disregard for human life—is sufficient to support a finding of specific intent. See *In re Washington*, 691 N.E.2d 285, 287 (Ohio 1998) (When "the prosecution seeks to prove intent to kill by establishing the defendant's participation in planning and executing a robbery, the factfinder may infer the defendant's intent to kill and may base its finding of intent to kill solely on that inference."). Thus, ample evidence showed that Stumpf specifically intended Mrs. Stout's death, whether as the actual shooter or as an aider and abettor; and either role is sufficient to support his conviction for aggravated murder.

Nor was Stumpf's guilty plea inconsistent with his desire, expressed at the plea hearing, to argue that he was not the shooter. If he could show that he was not, it would be a mitigating factor reducing his likelihood of a capital sentence. See Ohio Rev. Code § 2929.04(B)(6). So, as the dissenting judge below noted, Stumpf was necessarily cautious about ensuring that he would be able to present his story. And, consistent with this, the state court did not understand Stumpf's plea as an admission that he was the shooter. Rather, the court allowed Stumpf to argue, in mitigation, that he was not. To be sure, the court rejected that

argument, but not on the grounds that Stumpf had already admitted his role by pleading guilty.

Simply put, Stumpf was entirely reasonable when he decided to plead guilty with the understanding that he would try to convince the sentencing court that he was not the triggerman, and thus should receive a more lenient sentence. Ohio Br. at 26–27. His actions thus do not reflect any "confusion" about the nature of the offense to which he was pleading guilty. Stumpf Br. at 24–27. Accordingly, his decision to plead affords no basis to infer that Stumpf had not been informed of the elements of the offense.

Nor does Stumpf's attempt to link his plea to the prosecutor's "theory" of Stumpf's guilt—that Stumpf was the triggerman—do anything to advance his cause. In response to the Warden's argument that Stumpf was convicted of a "crime," not a "theory," see Ohio Br. at 33, Stumpf asserts that, once the plea was accepted, the prosecutor's "'theory' became the 'crime.'" Stumpf Br. at 19. And he separately asserts that the "theory" was also the "bulk of the evidence" of specific intent. *Id.* at 15. Stumpf unsurprisingly cites no case authority, and to our knowledge none exists, for the remarkable propositions that theories or arguments somehow become evidence or convictions. Stumpf was convicted of aggravated murder with a specification that the victim was killed for the purpose of "escaping detection, apprehension, trial, or punishment for another offense." Ohio Rev. Code § 2929.04(A)(3). As outlined above, a sufficient factual basis exists to support that conviction here. Stumpf was not, his protestations notwithstanding, "convicted of" being a "principal offender." See Stumpf Br. at 20. Indeed, the State dropped the felony-murder specification—the only one for which a principal-offender finding would have been required—as part of the plea agreement. J.A. 131–32.

Nor does Stumpf's "low, but normal, intelligence," Pet. App. 240a, invalidate his plea. Stumpf Br. at 28. At worst,

Stumpf had a "low average" intelligence, D. Ct. Op. at 41 (Feb. 7, 2001), and not the "unusually low mental capacity" that warranted the *Henderson* Court's conclusion that the guilty plea was involuntary, 426 U.S. at 647. In short, nothing in the state trial court record overcomes Stumpf's "significant burden."

3. Stumpf has failed to provide compelling extrinsic evidence of lack of explanation.

Having failed to substantiate his claim with record evidence, Stumpf also fails to present competent, compelling evidence to contradict his and his lawyers' on-the-record representations that his counsel advised him of the elements of the offense to which he pleaded guilty. See Ohio Br. at 31–32. Contrary to Stumpf's suggestion, the "numerous affidavits from those with any knowledge of Stumpf's legal representation and plea decision" in the "2600 pages" of the Sixth Circuit Joint Appendix do not show that his plea was unknowing or involuntary. See Stumpf Br. at 23. Affidavits from Stumpf's family members and social workers do not state that they were present during all of Stumpf's conferences with his attorneys. Those affidavits thus lack foundation for any opinion that Stump's counsel did not explain the crime to him. See, e.g., J.A. 312, Affidavit of Lesa Wood, sister of John Stumpf at ¶ 5 ("John told me that his attorney was not really explaining things."); Affidavit of Debbie Starkey (social worker), R. 13, Ex. D. to Ex. KK (state post-conviction review petition) at ¶ 19, (based on her limited interaction with Stumpf and his counsel, it would "not surprise" her "that [Stumpf] did not understand why, or to what he plead[ed] guilty"). Indeed, Stumpf's own affidavit does not state that his lawyers failed to explain the elements. J.A. 302 at ¶ 13. Instead, his years-after-the-fact affidavit expresses only that he thought he would not get the death penalty, notwithstanding the judge's express statement at the plea hearing that he remained death-eligible. See J.A. 302, Stumpf Affidavit at ¶¶ 9, 11; J.A. 139, 141–42, 145 (plea

hearing). Not even the Sixth Circuit believed that this misunderstanding sufficed to show that Stumpf's plea was unknowing. See Pet. App. 31a n.6.

Henderson itself appeared to involve the testimony of the defendant's attorneys regarding their advice to their client. See 426 U.S. at 642 (district court based its factual finding that Morgan's plea was involuntary on its statement that "[t]he lawyers gave respondent advice about the different sentences which could be imposed for the different offenses, but . . . did not explain the required element of intent."). Of course, the most competent, credible evidence of what the lawyer did and did not tell his client would be the lawyer's own testimony. Cf. *Allen v. Mullin*, 368 F.3d 1220, 1233, 1240–43 (10th Cir. 2004) (court reviewed testimony of defendant's counsel regarding her conferences with her client in assessing defendant's claim that his plea was unknowing); *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (a court applying *Henderson* veers "wide of the mark" by relying solely on a defendant's after-the-fact testimony and by requiring the State to produce contrary evidence).

Nor does the Sixth Circuit's view that Stumpf's counsel's performance at the plea hearing fell "outside the 'range of competence' to which the defendant is entitled," Pet. App. 32a, support its conclusion that Stumpf's plea was unknowing. Stumpf Br. at 27. As the Sixth Circuit noted, Stumpf did not even make an independent "ineffective assistance of counsel" claim based on the plea hearing. See Pet. App. 12a.[1] And the Sixth Circuit's criticism of defense counsel's performance was based on the Sixth Circuit's misunderstanding of Ohio law and misapprehension of the

[1] In the Sixth Circuit, Stumpf also abandoned his claim that appellate counsel was ineffective. See Pet. App. 10a. That claim had included an argument that his appellate counsel was ineffective for not raising as error the trial court's failure to explain the charge to Stump when he pleaded guilty. See J.A. 74–75 (district court opinion).

reasonable bases for Stumpf's decision to plead guilty. See also Ohio Br. at 22–27, 32–34.

Finally, Stumpf's suggestion that the evidence the State presented at Wesley's later trial undermined the voluntariness of Stumpf's earlier guilty plea is just wrong. Stumpf Br. at 28. Stumpf does not, and cannot, explain how newly-discovered evidence presented in a later proceeding would somehow show that Stumpf's conduct at his earlier plea hearing reflected a lack of understanding of the charges.

In sum, the Sixth Circuit's conclusion that Stumpf's guilty plea was unknowing and involuntary is unsupported by the law and incorrect on the facts, and should be reversed.

B. Stumpf was not deprived of due process when he was convicted based on his guilty plea, and sentenced to death, for the aggravated murder of Mary Jane Stout.

Stumpf's due process claim also fails. An "inconsistent theories" due process claim requires some showing that the prosecutor's conduct has materially undermined the reliability of a trial or proceeding. Stumpf cannot clear that hurdle here. Nor can Stumpf show that the prosecutor here secured inconsistent convictions. Stumpf and Wesley are both criminally liable for aggravated murder, so their convictions are not inconsistent. At bottom, Stumpf's due process claim is really an "actual innocence" claim in disguise, but he cannot succeed on that claim.

1. The prosecutor did not undermine the fairness of Stumpf's proceedings.

An "inconsistent theories" due process claim must rest on a showing either that the prosecutor engaged in bad faith conduct—such as presenting perjured testimony—or that he withheld exculpatory evidence or impeachment evidence from the defendant. Our confidence in the trial process rests on the belief that a full and fair adversarial representation is

the best procedural mechanism for ascertaining the truth. When a prosecutor withholds material evidence or knowingly presents false testimony, he compromises the reliability of that system, thereby depriving the defendant of due process.

So, for example, Stumpf cites a variety of cases involving prosecutors who knowingly presented perjured testimony or false evidence, or withheld material exculpatory information from a defendant. See Stumpf Br. at 31 (citing e.g., *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (knowing reliance on false testimony); *Miller v. Pate*, 386 U.S. 1, 6 (1967) (knowing use of false evidence); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (suppression of material exculpatory evidence)). But cf. *United States v. Ruiz*, 536 U.S. 622, 629–30 (2002) (suggesting that *Brady* is only a trial right).

Concerns about prosecutorial manipulation of the record similarly drove the courts in other cases on which Stumpf relies, such as *Smith v. Groose*, 205 F.3d 1045, 1051–52 (8th Cir. 2000), *Thompson v. Calderon*, 120 F.3d 1045, 1058 (9th Cir. 1997) (*en banc*), *rev'd on other grounds*, 523 U.S. 538 (1998), and *In re Sakarias*, 35 Cal. 4th 140 (2005). In *Smith*, the prosecutor relied on two different stories from the same witness, and both stories existed before either trial began. See *Smith*, 205 F.3d at 1050–51. In *Thompson*, the prosecutor presented one story from a group of jailhouse informants at a joint preliminary hearing for both defendants, then switched to a materially inconsistent story from a different group of jailhouse informants at Thompson's trial. The prosecutor then called witnesses at the co-defendant's later trial that the prosecutor had objected to in Thompson's earlier trial. See 120 F.3d at 1055–59. And in *Sakarias*, the prosecutor presented the same expert witness at two separate trials, but elicited different testimony designed to change the jury's perception of when and where the death occurred in order to bolster his case against each of the two defendants. See 35 Cal. 4th at 162.

The problem with Stumpf's due process claim is that he has failed to show any such process failure here. Indeed, the *Sakarias* court expressly noted that the prosecutor's "manipulation" of the evidence in that case made it very different from Stumpf's. See *id.* at 162, n. 6 ("Unlike Ipsen's conduct in Sakarias's trial, therefore, Stumpf's prosecutor 'did not manipulate evidence.'") (citation omitted). The California court's distinction was correct. Unlike the prosecutors in the cases Stumpf cites, the prosecutor here did not withhold material information, and he did not present perjured testimony or knowingly use false evidence at Stumpf's plea or sentencing hearings. The evidence that Stumpf complains about simply did not exist when Stumpf pleaded.

Nor did the prosecutor "withhold" Wesley's and Eastman's later trial testimony from Stumpf. *Brady*, 373 U.S at 87. Indeed, the prosecutor stipulated to admitting the transcript of Eastman's and Wesley's testimony at the hearing on Stumpf's later motion to vacate his plea. See J.A. 204–05 (hearing on Stumpf's motion to vacate plea); Pet. App. 280a (entry denying motion to vacate plea); cf. *Green v. Georgia*, 442 U.S. 95, 96–97 (1979) (prosecutor apparently objected to introduction of testimony of a witness who had testified at a co-defendant's earlier, separate trial; the Court ruled that the state court's exclusion of the testimony from the sentencing phase of Green's trial denied him due process). Thus, the concerns with the fairness of a defendant's trial that animate cases like *Napue* and *Brady* do not arise with regard to Stumpf's conviction and sentence.

The prosecutor's conduct at Wesley's trial similarly provides no support for Stumpf's due process claim. First, Stumpf lacks standing to complain about the way the prosecutor conducted Wesley's trial. This case does not fall within that narrow category of cases that allow a litigant to assert the due process rights of another. See *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720–22 (1990). And in any

event, evidence presented at Wesley's later trial could not invalidate Stumpf's earlier conviction based *on Stumpf's guilty plea*. Ohio Br. at 35–39.

Even apart from those flaws, the prosecutor's conduct at Wesley's trial did not violate due process. The prosecutor did not present perjured testimony or "false" evidence there. Eastman's testimony was not "false" for due process purposes simply because the defense counsel at Wesley's trial attacked Eastman's credibility.

Nor is Stumpf correct to assert that the prosecutor's willingness to put on Eastman's testimony means that the testimony must be treated as indisputably accurate. See Stumpf Br. at 34–35. To be sure, a prosecutor cannot put on testimony that he knows to be false. But that does not mean that a prosecutor can use only testimony that is unassailably true. Rather, where impeachment evidence exists, the prosecutor's obligation is to make that evidence available to defense counsel, and then let the fact finder make the ultimate determination of veracity. The prosecutor did exactly that with Eastman's testimony. He thus did not violate due process in leaving it to Wesley's jury to determine whether Wesley was the shooter (as Eastman testified) or only an accomplice (as Wesley testified). Eastman's testimony, which was not available at the time of Stumpf's plea and sentencing hearing, is simply one piece of evidence that Wesley's jury was entitled to consider (and reject if it chose), and that the prosecutor was entitled to present. Nor did the prosecutor violate due process by arguing in Stumpf's case—after turning the Eastman evidence over to Stumpf—that there was still sufficient evidence to support Stumpf's conviction and sentence.

Stumpf's complaint about the prosecutor's allegedly inconsistent "theory" in Wesley's case fares no better when evaluated under the Court's cases dealing with improper prosecutorial argument. See Stumpf Br. at 29–31 (claiming

Stumpf's due process rights were violated when State convicted and sentenced him based on a "factual theory" the State later repudiated). To the extent this argument rests on judicial estoppel principles, it is not at all clear that such principles do, or should, apply to the government in criminal cases. See *Thompson*, 120 F.3d at 1070 (Kozinski, J., dissenting) (citing cases). In any event, such principles would not help Stumpf, the *first* convicted defendant. Moreover, the Court's cases dealing with improper prosecutorial argument underscore that due process is offended only when a prosecutor's improper remarks so infect the proceeding as to deprive the defendant of a fair trial. See, e.g., *Darden v. Wainwright*, 477 U.S. 168, 181–82 (1986). That did not occur here. Throughout Stumpf's case, the prosecutor has fully disclosed all available evidence, and, as discussed below, he did not use that evidence to secure inconsistent convictions.[2]

Nor can Stumpf show a lack of process. He asserts he was entitled to a "due process inquiry to ensure that the result of his proceeding is a correct and just one." Stumpf Br. at 35. He has received not only one such "inquiry," but three. Stumpf litigated the newly-discovered evidence issue in the trial court, an intermediate court of appeals, and the Ohio Supreme Court. See Ohio Br. at 14–15. And each of these courts was fully apprised of all available evidence, including Eastman's testimony at Wesley's trial. All three courts considered the full evidence, including the "newly discovered evidence," and confirmed that Stumpf's conviction and sentence were proper. While Stumpf is understandably disappointed with those outcomes, he cannot credibly contend that he did not receive sufficient process.

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[2] Similarly, Stumpf cannot advance his due process claim against the prosecutor by relying on how *Wesley's counsel* used Stumpf's plea in *Wesley's trial*. See Stumpf Br. at 45–46. It is the prosecutor, not Wesley's counsel, who is bound by due process constraints.

Due process entitles Stumpf to fair proceedings in a fair tribunal with disclosure of all exculpatory evidence and a record that does not contain evidence known to be false. Stumpf received that here—three times over.

2. Stumpf cannot rely on the "duty to correct" to escape his conviction.

Stumpf also broadly asserts that a prosecutor has a "duty to correct" a conviction and sentence whose underlying "theory" was inconsistent with a later conviction and sentence of another defendant. See Stumpf Br. at 16 ("The prosecutor's materially inconsistent position at Wesley's trial necessarily rendered Stumpf's plea and sentence unreliable. The failure to correct this inconsistency violated Stumpf's due process rights."); *id.* at 29 ("Due process requires that a defendant's conviction and sentence be re-evaluated when the prosecutor has repudiated the theory and evidence used to secure the original conviction and sentence."). But here, contrary to Stumpf's argument, the prosecutor has not "repudiated" Stumpf's conviction or the evidence supporting it, see *id.* at 29, 35, and certainly did not "deem" Stumpf's conviction "false." *id.* at 33. Use of newly-discovered evidence at a later trial does not "render unreliable" the conviction, based on a guilty plea, of the first defendant. *Id.* at 16.

The Court has recognized a prosecutorial duty to correct, but that duty is limited to informing the court or opposing counsel when false information has been presented. See *Mooney v. Holohan*, 294 U.S. 103, 112–13 (1935); *Napue*, 360 U.S. at 269; *Alcorta v. Texas*, 355 U.S. 28, 30–31 (1957) (prosecutor did not disclose impeachment evidence and failed to correct trial testimony prosecutor knew to be misleading). That duty is a far cry from the one Stumpf asks the Court to create here. Nor does the prosecutor's duty not to withhold material exculpatory or impeachment evidence from the defense *before trial*, see *Brady*, 387 U.S. at 87,

establish a "duty to correct" an earlier conviction and sentence, issued before the evidence even existed.

Neither does *Johnson v. Mississippi*, 486 U.S. 578 (1988), support Stumpf's novel "duty to correct" claim. See Stumpf Br. at 34. In *Johnson*, the Court remanded the case to the state appellate court to consider whether the death sentence could stand despite the trial court's partial reliance, as an aggravating factor, on a prior conviction that had later been ruled invalid. First, the reliance on Johnson's prior conviction—later held to be a nullity—as an aggravating factor in Johnson's *own* sentencing hearing bears no resemblance to the facts here, where the prosecutor used newly discovered evidence in a co-defendant's later, separate trial. Second, the trial court here had before it the newly discovered evidence when it considered (and denied) Stumpf's motion to vacate his plea or sentence. Further, the Ohio Supreme Court independently considered the appropriateness of Stumpf's conviction and sentence on the record as a whole, including the new evidence from Wesley and Eastman. The State Supreme Court agreed with the trial and appellate courts that Stumpf's death sentence was appropriate even in light of the new evidence. Pet. App. 173a–74a (state court considered new evidence in regard to mitigating factors upon reweighing). Cf. *Clemons v. Mississippi*, 494 U.S. 738, 744–45 (1990) (even when sentencing court relies on an invalid aggravating factor, the state appellate court may cure the error by reweighing the aggravating and mitigating factors without the invalid aggravating factor). In short, Stumpf cannot rely on a "duty to correct" to undo his conviction, based on his plea.

3. The prosecutor did not secure "inconsistent" convictions.

This case does not involve a situation where the State has convicted two defendants for a crime only one could have committed. As noted above, Ohio law permits more

than one person to be convicted of aggravated murder, and to be eligible for a capital sentence, based on a single killing. Not only the "actual killer," but anyone who participated in the killing, and acted with the necessary intent, is criminally liable for the death. See above at 5. And many of the aggravating specifications that make a defendant eligible for capital punishment do not turn on whether or not the defendant was the actual shooter. See Ohio Rev. Code § 2929.04(A).

Under Ohio law Stumpf's and Wesley's convictions and sentences are entirely consistent with each other. The record contains overwhelming evidence that both were material participants in Mrs. Stout's murder, and that each acted with the necessary intent, independent of which one pulled the trigger. Indeed, in his closing at Wesley's trial, the prosecutor explicitly argued that the jury could find Wesley guilty based either on the conclusion that he was the triggerman, or on the conclusion that he helped Stumpf. J.A. 278–85. Similarly, in opposing Stumpf's attempt to vacate his plea, the prosecutor again relied on the fact that Stumpf was guilty independent of his precise role. J.A. 126. Equally important, the death specification on which Stumpf pleaded guilty did not require a showing that Stumpf was the shooter. His aggravating factor turned on the *reason* for which Mrs. Stout was killed—i.e., to escape detection for another crime—rather than on whether Stumpf pulled the trigger. Thus, Stumpf cannot establish any inconsistency.

Moreover, Stumpf's due process claim also fails because the "new evidence" presented at Wesley's trial would not have materially helped Stumpf with regard to his conviction or sentence. Stumpf Br. at 41–49. The "new evidence" includes testimony that hurts Stumpf—Wesley, the only other eyewitness to the shooting, testified that Stumpf killed Mrs. Stout. See Wesley Trial Tr. 2780–88 (Dist. Ct. R. 33). Moreover, while Eastman named Wesley as the shooter, his testimony still placed Stumpf right there when the

shooting occurred. See J.A. 241.[3] Thus, no one corroborates Stumpf's claim that he was out of the house during the shooting. See Stumpf Br. at 43 (citing Stumpf Sentencing Hr'g at 502 (D. Ct. R. 13)). Accordingly, even if the prosecutor did something wrong—and he did not—the testimony at Wesley's trial did not create a reasonable likelihood that Stumpf would not have been convicted or received a death sentence, even assuming that were the standard for such a claim. Stumpf Br. at 47.[4]

Further, the state trial court that heard Stumpf's motion to vacate his plea or sentence had before it the transcripts of Eastman's and Wesley's testimony at Wesley's trial, but it did not vacate Stumpf's sentence or conviction. See above at 11. This belies Stumpf's contention that "if a reasonable sentencing panel had learned of Eastman's testimony, the evidence would have demonstrated at best that Stumpf was an aider and abettor to Mrs. Stout's murder," and that Stumpf would not have received a death sentence. Stumpf Br. at 47.

The Ohio Court of Appeals similarly declined to vacate Stumpf's plea or sentence on the basis of the Eastman and Wesley trial testimony, finding "no evidentiary basis for relieving [Stumpf] of his plea." Pet. App. 181a–83a, 201a–04a. The Ohio Supreme Court agreed that Eastman's testimony added "insufficient mitigating weight" to affect the

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[3] Eastman testified: "Stumpf panicked, dropped the gun and Wesley picked up the gun and shot the lady. After he shot the lady I guess *they* was getting the rest of the stuff *they* was taking out of the house, *they* was going downstairs getting ready to leave. As *they* was turning to leave I guess *they* heard her moan or say something and then he [Wesley] said [Wesley] turned around and shot her again." (emphasis added).

[4] In fact, as discussed below, Stumpf's claim is really an actual innocence claim. Even if such a claim exists, it should be judged, at the very least, under the *Schlup v. Delo*, 513 U.S. 298 (1995), standard. See Ohio. Br. at 42–45. Stumpf's claim fails that test as well. He cannot show that, in light of all the evidence, it is "more likely than not" that no reasonable trier of fact would have convicted him. *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quotation omitted).

balancing of the mitigating factors against the aggravating circumstance to which Stumpf pleaded guilty. Pet. App. 171a–74a.[5]

In sum, the two convictions are consistent, so Stumpf's due process claim must fail.

4. Stumpf has not made out a viable "actual innocence" claim.

Stumpf's due process claim is really an actual innocence claim in disguise, but he cannot press that claim here. Actual innocence is not a free-standing habeas claim. Rather it is a gateway that allows the Court to consider an otherwise-barred constitutional claim on the merits. See *Herrera v. Collins*, 506 U.S. 390, 404 (1993). Stumpf has no such claim here. And even if actual innocence were a free-standing claim, Stumpf could not show that he was "actually innocent." See Ohio. Br. at 44–45. As noted above, and as three Ohio courts have found, overwhelming evidence supports his plea and his conviction.

Moreover, as the Court noted in *Sawyer v. Whitley*, 505 U.S. 333, 347 (1992), in proving "actual innocence," with regard to the death penalty, the defendant must "focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence." The newly-discovered evidence here goes solely to whether or not Stumpf was the shooter, which had nothing to do with the aggravating circumstance (i.e., killing a witness) to which he

[5] Contrary to Stumpf's implication, the Ohio Supreme Court did not reject Eastman's testimony because it was "hearsay." Stumpf Br. at 45, n.11. Instead, that court merely noted that Eastman's testimony was entitled to little weight, not only because it was hearsay, but because of the other evidence at Stumpf's sentencing hearing regarding Stumpf's involvement in the crime. Pet. App. 171a–72a (finding no error in trial court's determination that Eastman's testimony did not require that Stumpf's plea or sentence be set aside); see also Pet. App. 173a (finding that Eastman's testimony has minimal credibility).

pleaded guilty. As the new evidence was relevant only to mitigation, he cannot rely on it to support an "actual innocence" claim.

The evidence supports Stumpf's plea and conviction for aggravated murder, and the Sixth Circuit erred in determining otherwise.

C. The Sixth Circuit did not separately vacate Stumpf's sentence, so reinstating the conviction automatically reinstates the sentence.

Stumpf's mistaken claim that the Warden does not challenge the Sixth Circuit's actions in vacating Stumpf's death sentence rests on a flawed premise. Stumpf Br. at 15, 44. He fails to recognize that the Sixth Circuit did not separately vacate Stumpf's sentence apart from vacating his conviction. The court's language is directed toward the prosecutor's action in securing the *convictions*, not the sentences. That is, the court found that Stumpf's rights were violated by the prosecutor's use "of inconsistent, irreconcilable theories *to convict* both him and his accomplice" and it thus remanded for *retrial*, not resentencing. Pet. App. 48a (emphasis added); see also Pet. App. 3a ("Stumpf's due process rights were violated by the state's deliberate action *in securing convictions of both Stumpf and Wesley* for the same crime, using inconsistent theories.") (emphasis added). In short, the Sixth Circuit vacated Stumpf's *conviction*, and solely as a result of that, Stumpf's sentence also fell.

That is not to say that a federal court cannot, in appropriate circumstances, vacate a death sentence on habeas. See, e.g., *Herrera*, 506 U.S. at 403 ("The typical relief granted in federal habeas corpus is a conditional order of release unless the State elects to retry the successful habeas petitioner, or in a capital case a similar conditional order vacating the death sentence."). But the Sixth Circuit did not do so, and would not have been correct to do so, here.

In any event, the State's arguments as to why Stumpf's due process claim fails apply equally to his death sentence as to his conviction. Thus, if this Court reinstates Stumpf's conviction, as it should, the Sixth Circuit opinion gives no independent basis for not reinstating his sentence as well.

CONCLUSION

For the above reasons and those in the Warden's merit brief, the Court should reverse the judgment below.

Respectfully submitted,

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